Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00345/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 November 2018	**On 15 November 2018**

Before

UPPER TRIBUNAL JUDGE DAWSON
UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RUBEN [C]

Respondent

Representation:
For the Appellant: Mr J McGirr, Senior Home Office Presenting Officer
For the Respondent: Miss A Radford, instructed by Turpin & Miller LLP (Oxford)

DECISION AND REASONS

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge G J Ferguson who allowed the respondent's appeal under Regulation 36 of the Immigration (European Economic Area) Regulations 2016 with reference to a deportation order dated 4 May 2018 by reference to section 33(4) that his removal would breach his rights under the EU Treaties.

2. The respondent is a national of Portugal born 30 September 1993 and arrived in the United Kingdom with his mother in July 2008 at the age of

14. He was enrolled in a secondary school which he attended between September 2008 and July 2012. He thereafter pursued tertiary studies at Greenwich Management School between 2013 and 2015. He abandoned those studies and moved to Cardiff where he was convicted on 24 May 2016 at Cardiff Crown Court for possession of heroin and crack cocaine with intent to supply. He was sentenced to 54 months' imprisonment.

3. The FtT judge heard evidence from the respondent and his mother. He also had before him the sentencing judge's remarks as well as an OASys assessment dated 28 October 2016.

4. After recording the evidence and submissions as well as directing himself as to the applicable law, the judge set out his conclusions in the following terms:

> "21. Having considered the evidence about this issue, Mr [C] has established that he does accept that he was guilty of the criminal offence for which he was sentenced. There is first of all the significant evidence in the judge's sentencing remarks that he "pleaded guilty at the first opportunity" to the offence. It would be difficult in those circumstances to believe that he was not guilty. He maintained at the hearing that he accepted his guilt. The dispute appears genuinely to be the characterisation of the level of his involvement with the crime. The sentencing remarks show that his counsel accepted on his behalf, and the court treated him, as having a "significant role" within Category 2. This is distinguished within the sentencing remarks from a "leading role" which is a higher category, Mr [C] says that he accepted the role he had but did not accept that he had a leading role because he did not have such role.
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> 22. This conclusion that he accepts his guilt is not reached because Mr [C] was a truthful witness in all that he said. He was not being truthful about the level of his dependence on his mother. By the time he left home and moved to Cardiff he was not dependant on his mother in any way: she did not even know that he had been arrested, tried or convicted of a serious offence until about one year after his conviction when she found out via Facebook.
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> 23. The conclusion is instead reached on the basis that he pleaded guilty and that whether the OASys report records his position accurately or not, it is clear in its conclusion that he is a low risk to the public. The respondent included at section "L" of the bundle a guide published by the National Offender Management Service titled "an aide for interpreting OASys information in Immigration Appeals". This uses static and dynamic risk factors to estimate the risk of reoffending and the seriousness of any harm. It is based on "the information passed to them by other agencies and specialist tools and the application that there will be appropriate controls in the community to manage and monitor the offender. If he is assessed as a low risk even though it was believed he had not accepted any wrongdoing, then the fact that he has accepted wrongdoing must diminish the risk even further.

24. The fact that Mr [C] has not been able to undergo any courses in prison which are directly linked to rehabilitation is also a factor of little weight in the conclusion that he is a low risk. Although such courses may have helped his rehabilitation, he was not given the opportunity to take any of these courses, and the fact that he had not was known to the probation officer who prepared the OASys report. The National Offender Management Service guide states at page L2: "Everyone suggests that offenders in the Low likelihood of reoffending band are unlikely to benefit from additional interventions to reduce their reoffending such as cognitive skills programmes".

25. There is therefore no significant reason on which to reach a different conclusion to the comprehensive assessment of the OASys report. The level of risk of reoffending and of future harm does not meet the "serious grounds" test. The appellant has therefore discharged the burden of proof on him to show that there are no serious grounds to establish that he is a present, genuine and sufficiently serious threat to the public. The outcome therefore does not depend on any assessment of the proportionality of the decision."

5. Permission to appeal has been granted on two grounds of challenge. The first is headed "Material misdirection in law". In support, it is argued in the grounds that the judge had failed to adequately consider the respondent's significant role in the offence and his potential risk of reoffending. Although the respondent had accepted he played a role in a "narcotic exercise", he had nevertheless sought to minimise how extensive that was. The fact that the respondent did not fully accept his guilt made the present threat and risk of serious harm even more acute. The respondent had also failed to deal with the claimed reasons for offending which related to earning money to fund his education. The First-tier Tribunal had failed to apply the established jurisprudence and so erred. There was no evidence the respondent's rehabilitation might not take place in Portugal and particularly pertinent is paragraph 7(g) of Schedule 1 to the Regulations which sets out that offences relating to drugs are an example of an offence likely to cause harm to society.

6. Ground 2 asserts a failure to take into account and/or resolve conflicts of fact on a material matter. It is asserted that the judge failed to consider the respondent's conduct in seeking to mislead the tribunal through claims that he had no family in Portugal and that he was dependent on his mother whilst in Cardiff were false. It is contended that the respondent's deportation to Portugal would be proportionate.

7. Mr McGirr clarified that neither ground was a rationality challenge. In respect of both, he contended that the judge had failed to give adequate reasons. As to the first ground, after discussion on the evidence that was before the tribunal, he accepted that the judge had considered the respondent's denial of responsibility when giving his reasons for his finding that the level of risk of reoffending and future harm did not meet the

"serious grounds" test. As to the second ground, he also accepted that the judge had factored into his reasoning, the respondent's untruthfulness.

8. As a consequence, Miss Radford had little to say by way of response. She argued the decision was rationally reached by the judge for which adequate reasons had been given in particular at [23] to [25] of the decision in concluding that the threshold had not been met.

9. In our judgement Mr McGirr was correct to acknowledge that the judge had taken account of the respondent's denial of responsibility and his untruthfulness in his reasons. The OASys report notes at 2.1:

> "Following police interview Mr [C] states that there was sufficient evidence linking him to all three offences for which he was subsequently charged and sentenced to 4 years and 6 months' imprisonment.
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> Mr [C] denies having any part of the offence."

10. At 2.14 it is recorded:

> "There is no pattern in Mr [C]'s offending as this is his first conviction. However there is a clear escalation in relation to the magnitude of the offence. Mr [C] understands the severity of the offence but remains to deny and minimise his involvement."

11. In addition, at 11.7 it is recorded:

> "Mr [C] informed me during interview that he is fully aware of the consequences of breaking the law, however, states that due to him not having played any part in the offence did not envisage him being imprisoned."

12. Finally, the author of the report sets out issues about attitudes contributing to risks of offending and harm. These include evidence that suggests he is involved in a criminal sub-culture, that he displayed a positive attitude towards staff and there was no evidence to suggest he would not comply with any supervision or licence conditions. The respondent indicates that he generally supported the values of society but it was nevertheless clear that he had "… blind spots particularly relating to his offending in this instance". At 12.6 and 12.8 the author notes:

> "Mr [C] denies any direct involvement with the current offence.
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> Mr [C] has stated that he will complete work geared towards reducing offending behaviour, but as stated above he denies any direct involvement with the current offence."

13. The judge noted at [18] of his decision the Secretary of State's position that the risk of harm did not take account of the fact that the respondent showed no remorse and denied any wrong doing. Even if the risk of reoffending was low, the risk, if he reoffended, was of an offence which would cause serious harm.

14. In the course of his submissions, Mr McGirr raised concerns with the rationality of the probation officer's thinking, an unusual approach as it was relied on by the Secretary of State who has the burden of proof in this appeal. There was a debate over the accuracy of the report recorded at [6] and [7] of the judge's decision as follows:

> "6. He was asked by the presenting officer about the answer recorded in the OASys report at 2.11 on K8-K9 where he denied any part in the offence and his answer was that he had not said what was recorded there. His answer at K22 was "not quite true. I said that I knew about the consequences. I not remember saying I had nothing to do with it." He was asked again why he denied the offence when the criminal court concluded that he a significant role and he said again: "I never denied that I was involved in this. I was denying that I had a leading role, the judge said I had a significant role. I always accepted that I had a role. I do accept that I had a significant role."
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> 7. Mr [C] said that there was another error in the OASys report at K12 4.2 which recorded that he had been employed in retail at his father's shop. He confirmed that he had never met his father and did not know why the report mentioned his father. He then described how he had started university studying business management but dropped out in 2014 after the first year and moved to Cardiff in 2015 where he had become involved with selling the drugs which led to his conviction. He said that he had still been dependant on his mother when he was in Cardiff and would not be able to live and work in Portugal."

15. Mr McGirr did not pursue any argument that deficiencies in the report meant that it could not be relied on as an indicator of the risk of reoffending, an understandable position in the light of the report being the basis on which it was contended the respondent represented a risk.

16. The judge reached no finding on the respondent's claim that what he had said to the probation office had not been recorded as it is evident he did not consider this necessary. He observed that the focus of submissions at the hearing was the analysis of the OASys report and he acknowledged the respondent's denial in his conclusions. This is revealed in [23] of the decision in terms that as the risk of reoffending identified by the Probation Officer was predicated on the respondent not accepting guilt, that risk would, on that officer's analysis be lower if (as the judge found) the respondent had acknowledged his offending." It cannot be said that the judge failed to give adequate reasons or failed to take all material matters into account.

17. Turning to the second ground, the statement by the respondent, which he adopted at the hearing, indicated that apart from the short time that he had been living in Cardiff (from 2015) he had always lived with his mother and been dependent upon her. Mrs [C]'s statement does not address where the respondent was living after he completed his High School studies in 2012. The evidence demonstrates that he was pursuing courses

at Greenwich School of Management after completing his A Levels at Epping Forest College. He had been enrolled in Greenwich in 2013 and was there until 2015. The judge recorded the evidence given by Mrs [C] at the hearing. This included a statement that her son had moved out of her home when he was aged 19 and that she did not know where he had lived after that or what he had done. She did not know that he had been sentenced until a year later when she had seen something on Facebook.

18. If this chronology is correct, the respondent moved out of the family house in 2012, well before moving to Cardiff in 2015. The judge acknowledged in [22] of his decision that the respondent had not been truthful about the level of his dependence on his mother. The approach taken by the judge however was to focus on the respondent's guilty plea and the report's conclusion that he was at low risk to the public. He gave adequate reasons for his conclusion that the threshold was not met and as with the first ground took all the evidence into account.

19. By way of conclusion the challenge by the Secretary of State is to the adequacy of reasons given by the judge for his decision. Mr McGirr acknowledged that the judge had all the evidence into account and he acknowledged that the result was a reasoned one. Accordingly, we are satisfied that the Secretary of State has not made out the grounds on which permission has been granted.

NOTICE OF DECISION

The appeal is dismissed

No anonymity direction is made.

Signed Date 9 November 2018

UTJ Dawson

Upper Tribunal Judge Dawson